

No. \_\_\_\_\_

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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IN RE PERSONAL RESTRAINT PETITION OF

**RONALD MENDES,**

PETITIONER.

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**PERSONAL RESTRAINT PETITION**

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A. IDENTITY AND STATUS OF PETITIONER

Ronald Mendes (hereinafter “Mendes”) was convicted of murder in Pierce County (Case No. 08-1-00527-7).

Mr. Mendes (DOC # 762933) is currently incarcerated at Airway Heights Correctional Center in Airway Heights, Washington.

This is his first collateral attack on the current judgment.

B. FACTS

The Washington Supreme Court summarized the facts:

Mendes met Lori Palomo in October 2007, when Palomo was temporarily estranged from her long-term and live-in boyfriend, Saylor. Palomo and Mendes engaged in a three-week intimate relationship that ended when Palomo returned to live with Saylor. Even though Saylor and Palomo were back together, Mendes occasionally came to Saylor's house to see Palomo. All three were methamphetamine users.

One night, while Palomo's car was parked at Saylor's house, someone vandalized it. Palomo and Saylor suspected Mendes was the vandal and thereafter, Saylor did not want Mendes to come over. Palomo asked Mendes not to come around anymore.

On January 27, 2008, Mendes returned to Saylor's house armed with a loaded .45 caliber gun. Charles Bollinger, one of three house guests of Saylor's, met Mendes at the front door. Bollinger advised Mendes that he should not be at the home. Bollinger and Mendes went to a gas station and then returned to the home. During their trip to the gas station, Mendes showed Bollinger the gun. Upon returning to the house, Bollinger woke Saylor to inform him that Mendes was in the house. McKay Brown, another house guest, advised Mendes to leave, but he did not leave.

Learning that Mendes was in the house, Saylor dressed and went to the front room. A brief “ruckus” occurred, in which Saylor pushed Mendes against the front door and the two swung at each

other. 7 Verbatim Report of Proceedings (VRP) (Apr. 25, 2011) at 324. Mendes then aimed the gun at Saylor and said, “I’ll smoke you, mother fucker.” 8 VRP (Apr. 26, 2011) at 456. Saylor left the front room to find his baseball bat, and Bollinger yelled at Mendes again to leave.

During this time, Mendes claims that he tried to leave but could not move quickly because of a bad hip and at one point, he paused because he thought he dropped his methamphetamine. When Saylor returned to the front room with the bat in the air, Bollinger had Mendes near the front doorway. Mendes saw Saylor coming toward him with the bat in the air. Mendes immediately shot Saylor in the chest, killing him.

*State v. Mendes*, 180 Wash.2d 188, 19-92, 322 P.3d 791 (2014). Additional facts appear in the respective sections below.

Mendes has been tried twice. The first jury found Mendes guilty of second degree murder and guilty of unlawful possession of a firearm. Mendes appealed and in an unpublished opinion, the Court of Appeals reversed his conviction. The Court of Appeals reversed because Mendes’s trial counsel was ineffective for failing to request a revived self-defense jury instruction, and because the trial court erred in failing to instruct the jury that it could acquit Mendes of second degree murder if it found that he acted in self-defense when he committed the predicate assault.

Despite the IAC findings, the same attorney was reappointed to represent Mendes at the retrial.

On remand and by amended information, the State charged Mendes with second degree intentional murder, second degree

felony murder, and four counts of witness tampering. After the State's case in chief, Mendes asked the trial court whether he would be entitled to a self-defense instruction based on the State's evidence alone. The trial court declined to decide the motion until both sides rested. Mendes testified but told the court that his testimony would be given over his standing objection and that his decision to testify was based on the court's ruling. The jury convicted Mendes of second degree felony murder, the firearm enhancement, and four counts of witness tampering. Mendes was sentenced to 517 months. Mendes appealed the felony murder conviction. The Court of Appeals affirmed. The Supreme Court took review, but only of the issue of compelled testimony. The Washington Supreme Court affirmed.

*Mendes*, 180 Wn.2d at 196.

Mr. Mendes filed a petition for a writ of certiorari in the United States Supreme Court. Docket No. 14-8402. That Court declined review on March 30, 2015. This petition timely follows. RCW 10.73.090(3)(c).

#### C. ARGUMENT

- 1a. The Prosecutor Improperly Argued that Mendes Should Be Convicted Because the Deceased was Acting in Self-Defense Thereby Misstating the Instructions, Most Significantly the State's Burden of Proof.
- 1b. Mr. Mendes was Denied His Sixth Amendment Right to Effective Assistance of Counsel When Counsel Failed to Object to the Prosecutorial Misconduct.

The prosecutor argued that self-defense was a comparative determination, requiring jurors to evaluate whether the deceased was acting unlawfully. The prosecutor began argument:

First, we can't lose sight of what this case was about. This case was about Danny Saylor. Danny Saylor has been reduced to an exhibit. Danny Saylor is now Exhibit 1. Why did Danny Saylor die? Well, the defendant would have you believe that Danny Saylor died because it was Danny Saylor's own fault, that it was Danny Saylor's own actions.

RP 1345. The prosecutor continued:

Danny did nothing but defend himself in his own home on the night of January 28th of 2008.

*Id.* Later, the prosecutor argued that the fact that the deceased was in his own home gave him increased rights:

When Danny came back out with the bat, Danny was defending himself in his own home against an intruder who at this point had come into his house uninvited by him and now actually pointed a gun at him....

So at that point, the defendant shot Danny while Danny was doing what anyone else may have done in that same situation. What any other homeowner may have done in that same situation was defend themselves and the other people in their house and their home and property. Now, the defendant is trying to lay the blame on Danny Saylor. Now, remember, the defendant is the one who made choices, and that's why he's here today. We are not here to decide if the defendant is necessarily a bad person. We are here to decide whether or not the choices that he made on January 28th amounted to guilt of murder. Danny was simply minding his own business in his own home.

RP 1350-51. Then, the prosecutor turned his attention on how the instructions required an assessment of the actions of the deceased:

Another jury instruction that's important here is the no-duty-to-retreat instruction. It's Instruction No. 28. This is basically a-man's-home-is-his-castle instruction. *This jury instruction applies to Danny Saylor.* It's not up to Danny Saylor to retreat. In this case, he did not retreat. He does not have to retreat. He is in his own home. Danny Saylor went to the back of his house to look for a weapon, but at no time did Danny Saylor retreat and at no time does the law require a homeowner to retreat. Danny Saylor has the right to stand his ground in his own home just like any homeowner can do. He has the right to protect it and whoever's inside. In this case, Danny did that. All of Danny's actions were, again, reactions to every move the defendant made. They were in conformity of the law. Danny had the right do what he needed to do to get an unwanted person out of his house. When that unwanted person pulled a gun, Danny had the right to stand his ground and react.

RP 1353-54 (emphasis added). The prosecutor continued to argue that the “no duty to retreat” instruction was used to measure the lawfulness of Saylor’s actions.

Danny Saylor actually has a legal right to be where he is. He had no duty to retreat whatsoever. And as a homeowner, he has absolutely the right to defend himself in his own home. *We see these types of cases during the year a few times, and the homeowner gets to defend themselves.* Again, no duty to retreat on Danny Saylor's part.

RP 1396 (emphasis added). The prosecutor summarized:

Danny Saylor did absolutely nothing wrong, and the defendant should be held for killing him on January 28th.

RP 1366. In addition to arguing that self-defense was a comparative exercise that required jurors to determine if the deceased had a duty to retreat, the prosecutor told jurors that the reasonable person standard was “would you have done what the defendant did if you knew what he knew?”

RP 1399. The prosecutor also improperly told jurors: “There's no question

in this case that the defendant *murdered* Danny Saylor.” RP 1351-52 (emphasis added). Later, he stated: “It’s just a matter of whether or not the defendant should be *accountable* for what he did.” RP 1364 (emphasis added).

Misconduct pervaded the prosecutor’s argument. As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). A prosecutor commits misconduct by misstating the law. *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996). Such misconduct poses a serious risk of prejudice because a “ ‘prosecutor’s argument is likely to have significant persuasive force with the jury’ “ due in part to “ ‘the prestige associated with the prosecutor’s office.’ ” *In re PRP of Glasmann*, 175 Wn.2d at 706; *accord Warren*, 165 Wn.2d at 27 (holding a prosecutor’s misstatement of the burden of proof “particularly grievous” because “[t]he jury knows that the prosecutor is an officer of the State”). Thus, “[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

In this case, the prosecutor improperly told jurors that there was no question that Mendes “murdered” Saylor and that jurors had to determine if Mendes would be held “accountable” for his actions—mischaracterizing the evidence and minimizing the right to self-defense. The prosecutor

invoked the integrity and special expertise of the prosecutor's entire office, assuring jurors that they reviewed shootings that take place in a person's home and that this was a case, like those, where the homeowner was acting within his rights. These arguments were all improper.

But, the prosecutor's argument went much further, seriously misstating the law of self-defense. The prosecutor argued that self-defense required jurors to measure the actions of the deceased, repeatedly suggesting that only if juror found the deceased had acted according to the law of self-defense then Mendes was guilty. It is improper for the prosecutor to misplace the burden of proof. *State v. Gregory*, 158 Wash.2d 759, 859–60, 147 P.3d 1201 (2006).

Whether or not a defendant acts in self-defense focuses on the actions and state-of-mind of the defendant. Whether the defense has presented evidence of self-defense is a question for the trial court to address when deciding whether to instruct the jury on the law of self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). It is improper to shift the burden. *State v. McCreven*, 170 Wn.App. 444, 471, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013). The *Glasmann* court, furthermore, held that "it was clearly misconduct for the prosecutor to inform the jury that acquittal was appropriate only if the jury believed Glasmann, and [this] shows the prosecutor's failure to prosecute this case as an impartial officer of the court." 175 Wn.2d at 714.



- 2a. The Prosecutor's Improper Argument on the Felony Murder Count Improperly Eliminated Mr. Mendes's Right to Self Defense.
- 2b. Mr. Mendes Was Denied His Right to Effective Assistance of Counsel When Counsel Failed to Object to the Improper Argument.

Mr. Mendes was acquitted of intentional murder. He was convicted of felony murder. The prosecutor argued the application of self-defense to felony murder count in a manner that eliminated Mendes' right to self-defense. With regard to the felony murder theory, the prosecutor argued:

In this case, the defendant -- the defendant pointed a gun at Danny Saylor and threatened to shoot him. In fact, he said, I'll kill you, mother fucker. That's an assault in the second degree. It was when the defendant was fleeing from that assault in the second degree did he then shoot and kill Danny Saylor. Because it was in the flight therefrom, the law says that you can be held accountable for someone's death when you are immediately fleeing from another felony. In this case, assault in the second degree.

RP 1359-60. This argument eliminated Mr. Mendes's right to self-defense by applying that instruction only to the early threat and not to the shooting. Put another way, the argument created strict liability for the death of Saylor, if jurors found only that Mendes had committed an earlier assault—even if jurors concluded that Mendes killed in self-defense.

The felony murder rule applies strict liability while fleeing from a crime still in progress. *State v. Dennison*, 115 Wash.2d 609, 801 P.2d 193 (1990). But, it is misleading to suggest that that the felony murder rule applies strict liability for a defendant who is arguably attempting to retreat

after committing a completed assault and who then acts in self-defense defense while “fleeing.” Instead, that argument violated Due Process because it distorts the State’s burden of providing the absence of self-defense beyond a reasonable doubt by effectively eliminating the right to self-defense.

This Court should reverse.

3. The Reappointment of Counsel Who Had Been Found Ineffective in this Case Created a Conflict of Interest.

After a finding of ineffectiveness, Mr. Mendes’ case was returned for a new trial. The same lawyer who had already been found ineffective was reappointed to his case. This Court should reverse. *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996).

To establish a Sixth Amendment violation, Del Muro must show “an actual conflict of interest adversely affected his lawyer's performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). A defendant who establishes an actual conflict “need only show that some effect on counsel's handling of particular aspects of the trial was ‘likely.’” *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir.1992). Although this is not a case where appointed counsel was required to produce evidence of his own ineffectiveness at a hearing, it is a case where an appellate court found that counsel was deficient in his representation of Mendes. In addition, the reviewing court found a reasonable likelihood of a different outcome if

counsel had performed adequately. The main problem with reappointing counsel is that Mendes had alleged that counsel had performed deficiently. If Mendes was convicted again without the errors from the first trial, then counsel would be vindicated. The conflict was not only actual, but likely to affect counsel's performance. This Court should presume prejudice and reverse.

- 4a. Mr. Mendes' Rights to Due Process and a Fair Trial Were Violated When the Jury Heard that He Was in Custody.
- 4b. Mr. Mendes' Was Denied His Right to Effective Assistance of Trial and Appellate Counsel Where Trial Counsel Failed to Object and Appellate Counsel Failed to Assign Error to the Introduction of Mendes' Custody Status.

A defendant's custody status is irrelevant and prejudicial. Learning that a defendant is in custody impairs the presumption of innocence. The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). For these reasons the courts must be alert to any factor that may "undermine the fairness of the fact-finding process." *Williams*, 425 U.S. 501, 503 (1976).

The presumption of innocence, although not articulated in the Constitution, 'is a basic component of a fair trial under our system of criminal justice.' " *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967

(1999) (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)). In order to preserve a defendant's presumption of innocence before a jury, the defendant is “entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man. *Id.* “Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” *Id.* at 845. Such measures threaten a defendant's right to a fair trial because they erode his presumption of innocence; these types of courtroom practices are inherently prejudicial. *See, e.g., id.* at 844–45,

Washington courts review alleged violations of the right to an impartial jury and the presumption of innocence de novo. *State v. Johnson*, 125 Wash.App. 443, 457, 105 P.3d 85 (2005). Whether a particular practice had a negative effect on the judgment of jurors receives “close judicial scrutiny.” *Williams*, 425 U.S. at 504; *Estes v. Texas*, 381 U.S. 532 (1965); *In re Murchison*, 349 U.S. 133 (1955). Washington courts evaluate the likely effects “based on reason, principle, and common human experience.” *Williams*, 425 U.S. at 504.

In *State v. Jaime*, 168 Wash.2d 857 233 P.3d 554 (2010), this Court noted that jurors reasonably view a jail as a high-security place that houses individuals *who need to be in custody*.

During trial, the State presented evidence and attacked the credibility of Mr. Mendes with phone calls which clearly indicated they were made from the jail. RP 1210; 125. This evidence was highly prejudicial and easy to redact. Nevertheless, no objection was made at trial and appellate counsel failed to assign error on appeal. As a result, this Court can reach this issue either as a due process/fair trial issue or a Sixth Amendment violation of the right to effective assistance of counsel. If the issue had been raised on direct appeal, the presumption of harm would have applied. As a result, Mendes urges this Court to analyze the issue with that framework first. However, under any configuration, reversal is required.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should grant the PRP and order appropriate relief.

DATED this 17<sup>th</sup> day of March, 2016.

Respectfully Submitted:

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## VERIFICATION BY PETITIONER

I, Ron Mendes, declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

2-9-16  
Date and Place

  
Ronald Melvin Mendes

# ALSEPT & ELLIS LAW OFFICE

**March 17, 2016 - 8:34 AM**

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